WAR FOOD ADMINISTRATION
OFFICE OF DISTRIBUTION
Washington 25, D. C.

# SUMMARIES OF DECISIONS BY THE SECRETARY OF AGRICULTURE AND THE WAR FOOD ADMINISTRATOR on complaints filed under THE PERISHABLE AGRICULTURAL COMMODITIES ACT

No. 10 - NOT TO BE PUBLISHED - September 15, 1944

## I N D E X

PACA SUMMARIES OF DECISIONS NOT TO BE PUBLISHED

S-2246-A, November 3, 1943, Docket 3357: (S. P.)

Application of Joe Bordenaro, Des Moines, Iowa, for a license under the Perishable Agricultural Commodities Act.

Order: Application for license granted and prior order vacated.

Outline of Facts

On March 5, 1943, Joe Bordenaro, doing business as the Bordenaro Fruit Company, filed an application dated March 1, 1943 for a license to engage as a commission merchant, dealer or broker in the handling of fresh fruits and vegetables in interstate commerce, as required by the licensing provisions of the Perishable Agricultural Commodities Act.

A previous application for a license was filed by applicant on March 10, 1939, but it was denied by order of the Acting Secretary of Agriculture dated July 15, 1939, because of practices engaged in by the applicant which are prohibited by and in violation of the Act.

Ruling included in Decision

Investigation made after the filing of the present application showed that the applicant has now demonstrated his fitness to engage in the business of a commission merchant, dealer or broker. It was concluded that a license should be issued to Joe Bordenaro, doing business as the Bordenaro Fruit Company. The order of July 15, 1939, in which he was denied such a license, was vacated.

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S-2957, October 7, 1942, Docket 3905: (Hearing)

PASCO COUNTY PEACH ASSOCIATION, TAMPA, FLORIDA v. J. F. SOLLEY & CO. INC., BALTIMORE, MARYLAND.

B-3
B-16

Violation charged: Failure to account correctly for twelve lots of peaches handled on consignment.

Principal point involved: Agent's authority to sell shipper's peaches did not provide implied authority to receive advances from buyer as credits on purchase prices, and shipper not bound by such payments to agent.

Order: Complainant awarded $787.50, plus interest; publication of facts.

Appeal: On appeal to Federal District Court, verdict was in favor of respondent, setting aside Secretary's order.

## Outline of Facts

After entering into an agreement in April, 1940, whereby the agent was to market complainant's peach crop on the Eastern markets and receive for his services a commission of 10% of the proceeds of sale, complainant gave to its agent a letter reading: "This is to introduce *** of Tampa, Florida, in connection with marketing our crop ... These peaches will be marketed under the name of Pasco County Peach Ass'n ... Mr. *** is our sales manager, and this is to advise that he has full and complete authority to close any transactions relating to the marketing of the peach crop belonging to the association." The agent showed this letter to the respondent and arranged for respondent to sell complainant's peaches for a compensation of 10% of the gross proceeds. Shipments were made by truck from Florida to Maryland in 12 lots, in May and June, 1940, freight prepaid, consigned to the agent, care of respondent. Accounts sales for the first two lots and check for the first lot were made in the name of the agent, but all others, at complainant's request, were made in the name of the complainant, each one showing deductions for commissions, storage, handling charges, advances to driver, and the like, but none showing advances to the agent, until the last two accounts sales, dated July 5, were rendered, when respondent sent to complainant a memorandum showing a deduction of $787.50 to cover a total of 12 different advances, ranging from $15 to $200, made from May 25, to June 20, to the agent. Upon receiving the memorandum, complainant wired its protest. Complaint was filed for the recovery of $787.50, the advance of which to the agent was claimed to be unauthorized.

Respondent claimed that the advances were authorized and constituted payment to complainant, leaving nothing due, the authority to receive payment being implied or apparent from the way the deal was handled.

The agent testified that he was authorized by complainant to take his commission from respondent as sales were made, to live and travel on; complainant's two bookkeepers testified that the agent was to get his commission at the end of the deal, and was to get any advances from complainant only.

## Rulings included in Decision

1. Although respondent may have thought that it was authorized, in the usual course of business, to make advances to complainant's agent out of the amounts payable to complainant, without reporting

the advances as made, the law applicable to the facts shown by the record is otherwise. The agent was not expressly, impliedly, or apparently authorized to receive or accept any part of the $787.50 as payment by respondent to complainant. The undisputed facts that complainant had accountings and checks made to it rather than to the agent, and protested immediately upon being informed that an advance had been made to the agent, supported the contention that the agent did not have the authority he claimed. Although he explained it otherwise, the agent's request that respondent not report his withdrawals until the end might also corroborate the bookkeepers' testimony in this regard. Although J. Frank Solley, on July 26, 1940, wrote that respondent knew only the agent during the deal and acted under his instructions, and Donald C. Solley testified at the hearing that they were the agent's peaches and he asked for advances on them, respondent did not contend that it did not know from the beginning that the agent was acting for complainant in marketing the fruit, and respondent saw the letter of authority complainant gave the agent. The authority given the agent was extensive, and the evidence showed that the agent exercised rather full power to determine where and at what price the peaches would be sold. But if respondent failed to notice, or forgot the fact, that complainant, not the agent, was the owner of the peaches, this oversight or lapse of memory should have been cured when respondent was notified to, and did, make accounts of sale and payment of checks to complainant, not to the agent.

2. Complainant's agent having had neither express, implied, nor apparent authority to receive payment for complainant's peaches, complainant was not bound by the payments made to the agent. Moreover, when respondent withdrew part of the proceeds realized on complainant's peaches and paid that part to the agent, and then sent accounts sales and checks to complainant without mentioning these withdrawals as they were made, respondent was not making the full disclosure of facts contemplated by the "truly and correctly to account" requirement of the act. Complainant was awarded $787.50, plus interest.

Appeal

Respondent filed an appeal on October 31, 1942, to the Federal District Court at Baltimore. The case was tried before a jury January 21, 1944. The verdict was in favor of respondent, thus setting aside the Secretary's order.

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S-3007, December 29, 1942, Docket 3909: (Hearing)

JUSTMAN & CO. INC., NEW YORK, N. Y. v. GERSTEIN & COMPANY, CHICAGO, ILLINOIS.

M-2
J-1
J-3
J-4

Violation charged: Failure truly and correctly to account for shipments handled on consignment.
Principal points involved: The words "truly and correctly to account" have long been interpreted to include payment; court decision to enjoin Secretary in disciplinary action not binding on Secretary in reparation proceeding; amendment of act, without disturbing Department construction, indicated confirmation.
Order: Complainant awarded $12,745.39 plus interest; publication of facts.
Appeal: Respondent filed appeal but case settled outside court.

Outline of Facts

During the period between November 7 and December 10, 1940 respondent, acting as broker, sold on behalf of complainant 40 carloads of fresh fruits and vegetables shipped from California and Arizona to Chicago, Illinois. Complainant alleged that respondent failed to account for the net proceeds from the sale of this produce.

In its answer respondent admitted that the fruits and vegetables were sold on the Chicago market but contended that the sales were made for the account of respondent and not for the account of complainant. It was also admitted that respondent was indebted to complainant in the sum of approximately $14,000.00 but respondent denied that its refusal to pay was a wilful act.

A hearing was held in Chicago on July 25, 1941. In letter of May 13, 1942 complainant admitted that the indebtedness had been reduced to $12,745.39. The question to be determined was one of law, namely, whether respondent violated section 2 of the Act by failing to pay the net proceeds to complainant.

Outline of official procedure

On August 20, 1931, the regulation of the Secretary defining the statutory words "truly and correctly to account" was amended by adding the words "also the prompt payment of deficits or other adjustments resulting from the handling of perishable agricultural commodities on consignment, and the prompt payment of the purchase price or other amount due either the seller or the buyer in accordance with the terms of the agreement***." Pursuant to this regulation, and in accordance with the apparent Congressional intention as to the scope of the statute, the Secretary, during the more than ten years which have elapsed since the regulation was amended, issued many orders awarding reparation against dealers who failed to pay the purchase price of produce, and, in disciplinary

proceedings, suspended or revoked numerous licenses because of failure of dealers to comply with their contracts in this respect. In a suit instituted by this respondent to enjoin enforcement of the Secretary's order of October 6, 1941, revoking respondent's license, a specially constituted Federal District Court of three judges, on March 5, 1942, entered a decree in favor of respondent on the ground that a licensee's failure to pay the purchase price of commodities bought by him is not in itself a violation of the act. No appeal was taken from the court's decree, but immediately thereafter the Secretary recommended to Congress the enactment of clarifying legislation. The Secretary's understanding of the Congressional intent in enacting the statute and the interpretation of the statute reflected by the regulation were promptly ratified and confirmed by the passage by Congress, on April 6, 1942, of H. R. 6360, which amended section 2, paragraph 4, of the act making violation of the act as set forth therein include failure to "make full payment promptly" and making it a violation also to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction as specified in that section.

Ruling included in Decision

Respondent violated section 2 of the act by failing to account to complainant for the shipments of produce involved in these complaints. Although the court's decision denying power to the Secretary to revoke the respondent's license because of failure to pay for produce purchased, is entitled to much respect, it is not, of course, binding upon the Secretary in this reparation proceeding and was not followed because: (1) the words "truly and correctly to account" have, for many years, been interpreted and applied in proceedings such as this, and in disciplinary proceedings, to include the actual making of payment, and have been so construed by the courts in cases under the Produce Agency Act, a criminal statute, and the courts have held that this consistent construction of the statute by the agency charged with its administration is rightly to be accorded great weight in determining the meaning of the statutory language; (2) silence alone may well imply acquiescence and approval by Congress in an administrative practice, but when Congress has spoken, as it did in 1934, 1936, 1937 and 1940, after issuance of the governing regulation, when it amended section 2 of the act, in which the words "truly and correctly to account" appeared, and made no change in the language of the act under which the definition of "truly and correctly to account" was promulgated, and did not disturb the established Departmental construction, such acquiescence and approval approach the positive and explicit; (3) the amendment of April 6, 1942, which, as is clearly shown by reports of the two Congressional committees, was asked for and enacted not to grant additional power or to extend the act's scope, but to lay at rest the

uncertainty created by the decision of the three-judge court, constitutes a specific legislative construction of the act and as such, is entitled to the highest respect and is most persuasive to the view that the Department's established construction of the act should be accepted and continued. Court decisions in support of these views were cited in the decision. Complainant was awarded $12,745.39 plus interest.

Appeal

An appeal to the U. S. District Court was filed by respondent but before judgment was rendered settlement was reached out of court by the payment and acceptance of a smaller sum.

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S-3027-A, November 3, 1943, Docket 4172: (S. P.)

Application of Sam Maglio (or Sam Magliolo) and Sam Barone for a license under the Perishable Agricultural Commodities Act.

Order: Application granted and prior order vacated.

Outline of Facts

On June 7, 1943, Sam Maglio and Sam Barone, doing business as the M & B Produce, a partnership, filed an application dated June 1, 1943, for a license to engage as a wholesale dealer in the handling of fresh fruits and fresh vegetables in interstate commerce, as required by the licensing provisions of the Perishable Agricultural Commodities Act.

A previous application for a license was filed by the applicants on May 23, 1942, for authority to operate as a partnership under the name of Sam Magliolo and Barone, but it was denied by order of the Assistant to the Secretary of Agriculture dated March 9, 1943, because of practices engaged in by Sam Barone which are prohibited by and in violation of the act.

Ruling included in Decision

Investigation made after the filing of the present application showed that Sam Barone has demonstrated his fitness to engage in the wholesale produce business in partnership with Sam Maglio. It was concluded that a license under the act should now be issued to Sam Maglio and Sam Barone, doing business as a partnership, under the name of the M & B Produce. The order of March 9, 1943, in which they were denied such a license, was vacated.

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S-3042, May 10, 1943, Docket 4230

Request of Ben Eisenberg, Cleveland, Ohio, to withdraw his application for a license.

Order: Applicant's request to withdraw his application for license granted and order to show cause dismissed.

Outline of Facts

On August 28, 1942 Ben Eisenberg, of Cleveland, Ohio, applied for a license under the Perishable Agricultural Commodities Act, 1930, to engage in the business of handling fresh fruits and vegetables in interstate commerce as a commission merchant, dealer or broker. By order of W. G. Meal, Chief, Fruit & Vegetable Branch, applicant was ordered to show cause why his application for license should not be denied because of his having in 1941 made misleading statements to an interstate shipper of produce and having failed to account to the shipper, in violation of the act.

In a letter dated March 22, 1943, applicant stated that he had moved from Cleveland to Texas, had filed another application for license, and wished to withdraw the application involved in this proceeding. W. G. Meal also requested withdrawal of the order to show cause, stating in a memorandum to the Hearing Clerk that applicant had made payment in full to the shipper.

Ruling included in Decision

Applicant's request to withdraw his application for a license was granted, and the order to show cause was dismissed.

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S-3044, June 4, 1943, Docket 4123: (Hearing)

TRI-STATE FRUIT CO., SIOUX FALLS, S. D. v. WESTERN FRUIT GROWERS, INC., REDLANDS, CALIF.

Violation charged: Failure to deliver carload of oranges in accordance with contract terms.
Principal points involved: Evidence did not show when excessive dryness in oranges occurred; delayed Federal inspection and subsequent condemnation did not establish condition at time of delivery.
N-13 Order: Complaint dismissed.
N-14

Outline of Facts

On January 14, 1939, complainant purchased from respondent, for

$1131.95 delivered, a carload of 462 boxes of oranges, graded "Aurora," originating in Redlands, Calif. on January 8. The terms of the sale were "delivered," subject to inspection, payable by sight-draft. The freight bill contained a notation "allow inspection." The car arrived at Sioux Falls, S. D. on January 19. On February 1 complainant first complained of the quality of the oranges, claiming excessive damage due to dryness. On February 16, a libel action was filed in the U. S. District Court for the District of South Dakota against 215 boxes, more or less, of oranges, part of the shipment here involved. On April 12 the Court ordered the U. S. Marshal to make disposition of the oranges on the ground that they were not fit for human consumption. Complainant's witness testified that on April 18, the U. S. Marshal confiscated 267 boxes of the oranges from this shipment. About August 12, 1940, complainant instituted a civil action in a South Dakota Court to garnish funds which complainant assumed belonged to respondent. The action was subsequently discontinued. Complaint was filed informally on September 7, 1939, on the ground that respondent, for a fraudulent purpose, misrepresented the quality of the fruit, and reparation for the loss allegedly sustained was sought.

Respondent denied failing to deliver oranges in accordance with contract.

Prior to shipment of the oranges from California, an inspection was made by respondent and it was discovered that the fruit contained dryness due to frost damage, amounting to 6 to 10%, which was within the tolerance of 15% permitted by the California Agricultural Code. As evidence of breach of any warranty as to condition at time of arrival there was submitted certificate of Federal inspection on February 8, 19 days after receipt by complainant, of 300 boxes of navel oranges labled "Aurora Brand Western Fruit Growers, Inc., California," when dryness showed up in approximately half of the stock. At that time complainant informed the inspector that these oranges comprised a part of the car unloaded on January 19.

Ruling included in Decision

Complainant submitted no evidence of fraudulent misrepresentation and failed to establish that the oranges did not comply with the contract upon arrival at destination. There was no evidence which indicated whether the excessive dryness which showed up so in the inspection of February 8 took place while the shipment was in transit, during the period of unloading from the car to complainant's warehouse, or in complainant's warehouse itself. Presumably, complainant inspected the oranges prior to acceptance. If not, complainant at least had the privilege of inspecting, as thoroughly as it desired, the entire contents of the car for the purpose of determining whether the fruit contained therein complied with the contract. Since inspection

of the oranges by a Federal inspector was not made upon their arrival, and was not made for 19 days thereafter, the subsequent condemnation of 267 boxes of the oranges did not establish their condition at the time of delivery to complainant. The complaint was therefore dismissed.

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S-3046, June 24, 1943, Docket 4226: (S. F.).

JEROME KANTRO, SALINAS, CALIFORNIA v. NATHAN SAVITZ, PHILADELPHIA, PENNSYLVANIA.

Violation charged: Failure to pay for brokerage earned in connection with several carloads of lettuce.
Principal point involved: Failure to pay brokerage fees earned was violation of section 2 of act.
Order: Complainant awarded $105, plus interest; respondent's counterclaim dismissed.

Outline of Facts

Respondent employed complainant to purchase seven carloads of lettuce for shipment from California to Philadelphia, Pa. Respondent accepted the lettuce which was purchased by complainant but failed and refused to pay brokerage fees of $15 per car, a total of $105, for which amount an award was sought.

Respondent contended that complainant failed to comply with respondent's instructions. Countercomplaint was filed for damages because of complainant's alleged failure to purchase a carload of carrots of the quality and size specified, and because of the purchase of one carload of lettuce without authority. Evidence showed that on December 23, 1942, respondent wired complainant to purchase a carload of "very fine quality" carrots, size medium to large, at a price not to exceed $2. Binney inspection at Philadelphia on January 2, of the carrots purchased by complainant, certified: "***Irregularly sized. Mostly small to medium, few large size . . Only fairly smooth to some rough and knobby. Fairly well colored roots . . Foliage straggly. Poor in appearance. Practically all bunches showing most leaves yellowing, yellow or brown discolored, few pale green. Ordinary quality. Foliage weak. No decay." Proceeds of sale at Philadelphia were less than cost. With reference to the car of lettuce which respondent claimed to have wired complainant not to purchase, wires relating to this car showed that in response to respondent's wired order of January 13, the lettuce was purchased and shipped prior to receipt of respondent's attempted cancellation of the order.

Rulings included in Decision

1. Respondent's failure to pay the brokerage fees was in violation of section 2 of the act. Complainant, acting as respondent's agent and upon wired instructions, purchased and shipped to respondent in interstate commerce 7 carloads of lettuce. Copies of wires attached to the complaint, purported to have been exchanged between the parties during January, 1942, showed that respondent ordered 2 cars of lettuce without making specifications as to size and quality; 2 cars of "best" lettuce; cars of "best lettuce daily;" and cars of lettuce of "outstanding quality." The record contained no inspection certificates or other substantial proof of quality, size, and condition. Complainant was awarded $105, plus interest.

2. Respondent's counterclaim for damages against complainant involved a breach of contract. That issue was not determined for the reason that prior to amendment of section 2, paragraph 4, on April 6, 1942, the statute did not declare the failure of a broker to perform a duty arising out of contract, to be a violation of the statute.

Reconsideration

Respondent, by petition, requested that the order be modified by eliminating the provision which required publication of the facts, contending that his failure to pay complainant prior to institution of this proceeding was due to his acting on advice of counsel that he had a proper set-off and counterclaim which was asserted in his answer to the complaint. By supplemental order dated August 12, 1943 the order was modified by striking from it the provision for publication of the facts.

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S-3058, September 18, 1943, Docket 4177: (S. P.)

J. C. RHINEHART, ELROY, ARIZ. v. STARR PRODUCE CO., PHILADELPHIA, PA.

Violation charged: Unjustified rejection of a carload of cantaloups shipped on consignment on a guaranteed price.

Principal point involved: When goods did not meet warranty of merchantability at destination, refusal to accept was not in violation of act; "merchantable" means such quality as is generally sold on the market and suitable for that purpose.

D-12

Order: Complaint dismissed.

Outline of Facts

On July 6, 1941, complainant shipped a carload of 291 crates of cantaloups from Rittenhouse, Arizona, consigned to himself at Kansas City, Mo. On July 7, respondent, through its agent, orally agreed to sell the cantaloups for complainant's account at Philadelphia, Pa. and advance 90¢ per crate, plus $7 precooling cost, on a guarantee that they would bring at least that amount. The car arrived at Philadelphia on July 13, and respondent was notified thereof early the next morning. On July 15, respondent wired complainant that it would have to refuse the car and on July 21 and 22 the carrier unloaded the cantaloups and sold them for the account of "whom it may concern." Complainant alleged that the car was not inspected until more than 48 hours after arrival, that respondent's rejection was not within a reasonable time, and that there was due from respondent $268.90.

Respondent, answering, alleged that the shipment was one of seven carloads, the other six of which were inspected by respondent's agent, who relied on complainant's representation that the stock was similar in quality and condition to that in the six inspected cars; and that the cantaloups were not in suitable shipping condition in that after arrival at Philadelphia they were inspected and found to be soft, greatly decayed, shrunken, and not merchantable.

Inspection was made by the Railroad Perishable Inspection Agency and the Binney Inspection Service on July 14, and the top layer was inspected by a Federal inspector at 9:30 a.m. the following day. An average of approximately 15% of the cantaloups, ranging in most samples from 3 to 47%, were affected by decay, chiefly Fusarium Rot, mostly in early stages, some in advanced stages; and approximately 20% of the melons had from 3 to 6 sunken, discolored areas ranging in size from three-fourths of an inch to one and one-half inches in diameter.

Evidence presented was in the form of verified statements of fact and depositions. As to any warranty that the stock was similar in quality and condition to that in six other cars, complainant said that the carload in question was the first and only one of the seven that was loaded at the time of purchase, and respondent's agent did not say that he had examined any of the 7 loads prior to his purchase of the one in question. Respondent's agent stated that complainant represented to him that the cantaloups were in good shipping condition and would be in merchantable condition at Philadelphia, which representation was denied by complainant. The exact date and time that respondent's agent notified complainant of the condition of the stock as disclosed by inspections at Philadelphia was also in dispute. Respondent's agent stated that on or about July 14 he received notice from his principal that inspection showed the cantaloups were in terrible condition, and that he immediately

notified complainant as to the condition found. As a matter of fact, respondent wired its agent on July 15 as to the condition and what it had reported the previous day. In a later wire to its agent on July 15, respondent reported the results of the Federal inspection and stated that it would have to refuse the shipment.

Rulings included in Decision.

1. Although the evidence was conflicting, it was held that complainant represented to respondent's agent that the cantaloups were in good shipping condition and would be merchantable on arrival at Philadelphia, but he did not say they were similar in quality and condition to those loaded in six other cars that were inspected by respondent's agent.

2. Complainant failed to sustain the burden of proving that the rejection was not within a reasonable time.

3. "Merchantable" means of such quality as is generally sold in the market, and suitable for that purpose, and, due to the defects shown by the inspection referred to above, the cantaloups were not merchantable on the Philadelphia market, as warranted by complainant. Since they were not merchantable and suitable for sale on the Philadelphia market, respondent's failure to accept the shipment and pay complainant the amount of the guaranteed advance was not in violation of the act. The complaint was therefore dismissed.

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S-3061, August 14, 1944, Docket 4261: (S. P.)

WILENSKY & CO., CHICAGO, ILL. v. RED RIVER POTATO CO. INC., EAST GRAND FORKS, MINN.

M-15

Violation charged: Failure to deliver 2 carloads of potatoes in compliance with contract.
Principal points involved: Since settlement made between parties complaint should be dismissed even though commodity did not meet warranty and complainant was damaged.
Order: Complaint dismissed.

Outline of Facts

On September 16, 1941, through its buying agent, complainant purchased from respondent, for shipment from Barnesville, Minnesota (after being washed at that point), to Chicago, Illinois, 2 carloads, of 360 bags each, of potatoes at 90¢ per cwt., or for $324

per carload f.o.b. East Grand Forks, Minnesota. One car was shipped on September 14 and the other on September 15, both consigned by respondent to itself at Chicago, the bills of lading bearing endorsement "Hold Mplse for Federal State Inspection." The first car arrived at Minneapolis on September 15 at 2:00 p.m. and Federal-State inspection was made at 10:10 a.m. the following day. The railroad received respondent's order to divert the car to Chicago at 6:30 p.m. on the 17th and the car was forwarded from Minneapolis at 1:40 a.m. September 18 and arrived at Chicago on the morning of September 19. The record lacked similar information for the other car.

The Federal-State inspection on September 16 showed that from 1 to 2% of the potatoes were affected with Soft Rot in 20% of the samples, and 80% of the samples were affected by Soft Rot ranging from 3 to 12%, averaging approximately 5%, the potatoes in this car then failing to grade U. S. No. 1 on account of Soft Rot in excess of tolerance. Inspection of the potatoes by private inspection agency in Chicago on September 19 showed the shipment was then affected by Soft Rot averaging about 20%. Complainant asked for an adjustment on the price because of the condition of the potatoes after their arrival in Chicago. About September 25 complainant offered to settle for a refund of 10¢ per sack on the purchase price, to which respondent agreed. Pursuant to the settlement respondent sent complainant its check for $72 dated September 25 but complainant did not cash the check. Complainant later tried to get a better adjustment on the potatoes but respondent would not agree. Complainant asked for an award of $463.75 for respondent's failure to deliver the quality of potatoes it sold complainant.

Respondent denied liability claiming that the potatoes were accepted at shipping point after complainant's agent had inspected them and that the parties had agreed to settle the matter for an allowance of 10¢ per bag.

By an order issued October 14, 1943 the complaint was dismissed on the ground that no warranty concerning the quality of the potatoes had been alleged in the complaint. Complainant's petition for reconsideration alleged that warranty of suitable shipping condition had been impliedly alleged and had been proved. As it appeared that some findings and conclusions should be modified, the entire order of October 14 was set aside.

Rulings included in Decision

It may be assumed that the issue of suitable shipping condition was sufficiently raised and presented by the pleadings and proof. However, the question of damages resulting from the condition of the

potatoes after shipment has been settled by the parties. Although complainant apparently became dissatisfied with the settlement and did not cash the check, the agreement to settle was completed when respondent accepted complainant's offer to settle for a specific refund. Even if respondent warranted the potatoes to be in suitable shipping condition, and if they were not, and if complainant was damaged, the claim has been settled and the complaint should be dismissed. It was ordered that respondent's check for $72 attached to the complaint should be returned to complainant.

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S-3068, November 16, 1943, Docket 4187: (Hearing)

W. B. SHAFER, INC., NORFOLK, VIRGINIA v. H. GLICK & COMPANY, INDIANAPOLIS, INDIANA.

G-9
G-1
H-13

Violation charged: Failure to pay for a carload of kale.
Principal points involved: Actual sales established reasonable market value; if goods fail to meet warranty, buyer may accept goods and set up against the seller breach of warranty by way of recoupment in diminution or extinction of the price.
Order: Complainant awarded $58.50, plus interest. Counterclaim dismissed.

Outline of Facts

On March 17, 1942, through a broker, acting as agent for both parties, complainant sold to respondent 700 bushels of new growth Blue Scotch kale, warranted as 90% U. S. No. 1, at $1.17½ per bushel delivered. The kale, shipped from Lake Smith, Va., was the last cut from the field and was not officially inspected and graded, although an experienced loader said he thought it graded U. S. No. 1 and testified that ice was placed in each basket and snow ice blown over the top of the load in the usual manner. The car arrived at Indianapolis, Ind. during the night of March 19 and was inspected the following morning by respondent, who removed and sold some of the kale loaded in the center between the doors. At 4:52 p.m. on March 20 the broker's Indianapolis office notified its Norfolk, Va. branch that respondent said inspection showed "slime most baskets... advise if want Government inspection." This was followed by a telephone conversation between complainant and respondent, over which there was sharp dispute. Complainant said that respondent was told "not to sell" the kale but to report the following Monday whether accepted, and asked for the full purchase price.

Respondent testified complainant said to "go ahead and handle the car," and, by counterclaim, asked for damages resulting from complainant's misrepresentation of the quality, negligent loading of the car, and for breach of warranty.

After R.P.I.A. inspection at 7:45 a.m. March 20, the plants were certified as "generally well formed and well trimmed. Stock is fresh, crisp, clean, and attractive. No decay." The temperature outside was noted as 42°, of commodity at top 52° and at bottom 46°. The next day at 10:00 a.m., the same inspector certified "Note lower leaves in 75% plants turning yellow. No ice noted in all baskets inspected. Consignee top iced this load."

Federal inspection at 10:40 a.m. March 21 stated "car partly unloaded. Each end of car 3 by 3 rows wide, 5 layers high, alternate baskets inverted; small amount of crushed ice over top of load," restricted to portion remaining in car, showed the pack as tight, no ice in baskets, and the temperature in the center of various baskets throughout the load ranged from 41 to 68°. The condition statement read: "Most plants are fresh and green but an average of 40% show from 2 to 5 mostly 2 to 3 outer leaves turning yellow, of which an average of 10% also show decay generally occurring as large spots on one or two outer leaves. Decay is Bacterial Soft Rot in various stages of development." The inspector testified that in his opinion "the car had started to heat or decay, or both... a few days previous to my inspection. It would be hard to tell how many hours or days, but quite a little while, I would think." He said that the presence of a sufficient quantity of ice would retard decay, but would not stop decay, and that based on the condition of the kale at the time of his inspection it probably did not grade 90% U. S. No. 1 at time of delivery to respondent on March 20.

Rulings included in Decision

1. Respondent had 4000 lbs. of snow ice blown on top of the load and inspected and accepted the kale on March 20. It failed to sustain the burden of proof to convincingly establish its claim that complainant stated in a telephone conversation on March 20 or 21 "to go ahead and handle the car," and was not justified in claiming a commission of $22.43.

2. The kale, at time of delivery to and acceptance by respondent did not meet complainant's warranty that it would grade 90% U. S. No. 1, being heated and in the process of deterioration.

3. Respondent's counterclaim was dismissed since there was no evidence in the record to support a claim for damages based upon misrepresentation of quality and negligence in loading.

Respondent's failure to pay complainant the reasonable value of the kale was in violation of section 2 of the act. Among the remedies provided by section 69 of the Uniform Sales Act for breach of warranty by the seller, is that the buyer may accept the goods and set up against the seller the breach of warranty by way of recoupment in

diminution or extinction of the price. Since this was a delivered sale, the net proceeds received by respondent were proof of the reasonable market value. During the period March 20 to and including March 27, respondent sold 181 bushels for a gross of $224.25 and, after deducting amounts paid as freight and cost of ice, had net proceeds of $58.50, for which amount, plus interest, complainant was awarded reparation. The other 519 bushels were of no market value and were dumped.

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S-3071, November 30, 1943, Docket 4169: (Hearing)

J. T. WALTON, WOODBURY, GA. v. C. COMELLA, INC., CLEVELAND, OHIO AND THE LANCASTER-ACKER COMPANY, ALBANY, GA.

Violation charged: Failure to pay in full for 11 carloads of peaches.

Principal point involved: Extrinsic evidence seeking to alter the terms of an unambiguous written contract is inadmissible; all agreements are presumed to be written into the contract; broker's authorizing buyer to handle shipments for seller's account, without authority, was violation of section 2.

U-12
N-19
F-8
B-11

Order: Complainant awarded $2,121.60, plus interest.

Outline of Facts

On July 21, 1941, through The Lancaster-Acker Co., acting as agent for both parties in the sale of one-half of complainant's peach crop, complainant and C. Comella, Inc. entered into a written contract, which both signed, in which Comella agreed to pay 70 cents for 1-3/4 inches and up to 2 inches, and 90 cents per bushel for 2 inches and up U. S. No. 1 peaches, on an f.o.b. basis. Under the contract, Comella deposited $2,000 in escrow in a Manchester, Georgia, bank, complainant, when each car was shipped, to present to the bank an original bill of lading, together with a Federal certificate showing the peaches to be U. S. No. 1, whereupon the bank was to pay through Lancaster-Acker Company $100 per car, and Lancaster-Acker Company to draw a draft on Comella for the balance of the purchase price. Six carloads, Federally inspected and graded U. S. No. 1, were shipped from Woodbury, Georgia, to Cleveland, Ohio, and were paid for in accordance with contract terms.

Beginning on July 25, complainant turned over to The Lancaster-Acker Company 11 more carloads, Federally inspected and graded U. S. No. 1. Complainant alleged that Comella accepted these 11 carloads but accounted for them on a commission basis; that he did not authorize the handling of the peaches on a commission basis, or any variation

in the terms of the written contract; and that Lancaster-Acker Company made a false and misleading statement for a fraudulent purpose in advising Comella that the sale was in effect on a delivered basis and that off-grade shipments might be handled for complainant's account. (In a telegram in the record, dated July 21, 1941, Lancaster-Acker did state that Comella should handle any cars which failed to grade U. S. No. 1 at destination for complainant's account.) Complainant asked for payment in accordance with the written contract.

Both respondents filed answers admitting there was a written contract. However, The Lancaster-Acker Company claimed complainant knew that the peaches were to grade U. S. No. 1 at destination and that complainant agreed to have off-grade shipments handled for his account. Comella contended that the sale was on a delivered basis and that complainant, through his agent, authorized the sale of off-grade shipments for his account. Comella's motion to dismiss the complaint could not be sustained as its allegations were sufficient to make charges against Comella within the purview of the Act.

Depositions were taken of witnesses to support respondent's contentions and of complainant to support his contention. Since extrinsic evidence seeking to alter the terms of an unambiguous written contract is inadmissible, complainant's objection to evidence offered by one witness was sufficient to require exclusion.

Rulings included in Decision

1. The written contract was specific, and extrinsic evidence could not be received to vary the terms of the written instrument. Smith v. Lawrence, 23 Ga. App. 796, 99 S.E. 536 (1919). All agreements made by the parties were presumed to be written into the contract. McDew v. Hollingsworth, 19 Ga. App. 185, S.E. 246 (1917).

2. When complainant delivered to respondent U. S. No. 1 peaches at shipping point, in suitable shipping condition, he fulfilled his contract. Venice Growers Association v. Scandurra S. Galletta, S-1187.

3. The Lancaster-Acker Co., having agreed that Comella handle the cars that did not grade U. S. No. 1 for complainant's account, without authority of complainant and contrary to the terms of the written contract, failed, without reasonable excuse, to perform a duty arising out of the transaction, and, therefore, violated section 2 of the Act, for which complainant should be awarded reparation with interest.

4. The failure of C. Comella, Inc. to pay for 11 cars in accordance with the terms of the written contract constituted a violation of section 2 of the Act, for which complainant should be awarded reparation with interest.

5. C. Comella, Inc., in violation of the written contract, handled the cars that did not grade U. S. No. 1 at destination for complainant's account, thereby failing to account to complainant for the contract price of 11 cars, less $1,200 paid to complainant by the bank out of the escrow money, or $2,121.60, no part of which had been paid. Complainant was awarded that amount, plus interest, against the respondents.

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S-3079, December 20, 1943, Docket 4237: (S. P.)

MEXICAN PRODUCE COMPANY, INC., NOGALES, ARIZONA v. CHICAGO TOMATO COMPANY, CHICAGO, ILLINOIS.

N-4
D-4x

Violation charged: Failure to pay for carload of tomatoes.

Principal points involved: Burden of proof on respondent to prove its allegations; Bacterial Soft Rot and Phoma Rot are not caused by chilling.

Order: Complainant awarded $475.18, plus interest, publication of facts; Countercomplaint dismissed.

Reconsideration: Petition filed and later dismissed; facts not to be published.

Outline of Facts

On February 28, 1942 complainant sold to respondent at Chicago, Illinois through a broker, a carload of tomatoes, which was shipped from Naranjo, Sinaloa, Mexico to Chicago, for $1474.50, less freight and duty charges of $999.32; or $475.18 net, for which complainant seeks reparation.

Respondent, in its answer, admitted the purchase and acceptance of the tomatoes, but alleged that it accepted them subject to complainant's guarantee that they would not deteriorate because the car was iced, and that the tomatoes did not meet the requirements of this guarantee. Respondent stated that it handled the shipment for complainant's account and denied any indebtedness for the purchase price. With its answer respondent filed a crosscomplaint stating that the chilling of the tomatoes brought about a Phoma Rot and Bacterial Soft Rot, and that respondent has been damaged in the sum of $594.95, the alleged loss on the resale of the tomatoes.

Although in a letter dated August 14, 1943, the parties were given an opportunity to do so, they made no objection to official notice which was taken of the U. S. Department of Agriculture Miscellaneous Publication No. 121, entitled "Market Diseases of Fruits and Vegetables: Tomatoes, Peppers, Eggplants," and the data contained therein relative to Bacterial Soft Rot and Phoma Rot.

Rulings included in Decision

1. The tomatoes did not break down from chilling. The burden of proof rested upon respondent to prove, by a preponderance of the evidence, the allegations made in its answer and counter-complaint. Therefore, the burden of proof was upon respondent to show that the tomatoes were damaged due to chilling, and therefore not within the requirements of the guarantee; but respondent failed to present any evidence which would sustain the burden.

2. Respondent's failure to pay the purchase price of the tomatoes, in accordance with its contract, constituted a violation of section 2 of the act, and complainant was awarded $475.18, plus interest.

3. It was concluded from the data in the U. S. D. A. Miscellaneous Publication No. 121 that Bacterial Soft Rot and Phoma Rot are not caused by chilling. Respondent's countercomplaint was dismissed.

Reconsideration:

Petition for reconsideration was filed January 7, 1943. Order stayed by Supplemental Order dated January 12, 1943. Proceeding dismissed by order June 15, 1944, upon request of parties who reported case had been settled. No publication required by order dated July 18, 1944.

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S-3081, December 27, 1943, Docket 3416: (S. P.)

Re: Philip Dublin, Brooklyn, N. Y. for a license to engage as a wholesale dealer in the handling of fresh fruits and fresh vegetables in interstate commerce under the Perishable Agricultural Commodities Act.

Principal point involved: Applicant has not demonstrated fitness to engage in business of a wholesale dealer.

Order: Application for license denied.

Outline of Facts

On May 20, 1943, Philip Dublin, Brooklyn, New York, filed an application dated May 12, 1943 for a license to engage as a wholesale dealer in the handling of fresh fruits and fresh vegetables in interstate commerce as required by the licensing provisions of the Perishable Agricultural Commodities Act. A previous application for a license was filed by the applicant

on June 23, 1939, for authority to engage in the business of a commission merchant, dealer, or broker, under the name of Dublin Potato Exchange. A license was denied by order of the Assistant Secretary of Agriculture dated March 29, 1940, S-2321, because of practices engaged in by the applicant which are prohibited by and in violation of the act.

Ruling included in Decision

Investigation made after the filing of the present application showed that the applicant has not demonstrated his fitness to engage in the business of a wholesale dealer, and it was concluded that a license should be denied, and the application herein was dismissed.

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S-3088, February 3, 1944, Docket 4321: (S. P.)

In re: J. E. Nelson & Son, Altoona, Pennsylvania

Outline of Facts

Disciplinary proceedings under the act against the respondent were instituted by a complaint dated November 9, 1943, signed by the Acting Chief, Fruit & Vegetable Branch, Food Distribution Administration (now the Office of Distribution), involving the sale in March, June and July 1943, by respondent in interstate commerce, of produce on consignment, and the alleged sale in August 1943 of a car of oranges in interstate commerce. Copies of the complaint were served on respondent on November 13, 1943. On December 23, 1943 the complainant requested that the complaint be dismissed because of insufficient evidence.

Order included in Decision

The complaint was ordered dismissed effective February 23, 1944.

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S-3094, March 2, 1944, Docket 4288 (S. P.)

JAKE KENNEY, BENTON HARBOR, MICHIGAN v. RIVERSIDE FRUIT EXCHANGE, RIVERSIDE, MICHIGAN.

Violation charged: Failure to deliver a truckload of peaches complying with contract specifications.
Principal point involved: In absence of allegation and evidence that respondent knew fruit was being purchased for resale in Duluth, recovery on ground that fruit was not in suitable shipping condition was not available.

Order: Complaint dismissed.

Outline of Facts

On August 30, 1942 respondent, through its agent, sold to complainant 420 bushels of U. S. No. 1 Elberta peaches, free from Brown Rot, at $2.35 per bushel f.o.b. Riverside, Michigan. They were loaded at respondent's packing plant at Riverside on the same day. Without inspecting the fruit (and never securing Federal inspection), complainant resold the peaches at $2.85 per bushel delivered at Duluth, Minn., invoicing the shipment as 420 bushels of Elbertas. Delivery by truck was made at Duluth on August 31, and complainant paid to respondent the purchase price and paid the transportation cost of 50¢ per bushel. On the date of delivery the peaches were inspected by the Duluth buyer, at which time some of the 78 bushels marked "Hale" were affected by Brown Rot, but the evidence did not disclose to what extent. The buyer notified complainant on August 31 of the condition of the peaches marked "Hale" and that the Elbertas showed some Brown Rot, and complainant transmitted the information to respondent on the same day. Complainant reduced the invoice price to the Duluth purchaser 50¢ per bushel on 342 bushels of Elbertas and, in accordance with his authorization, 78 bushels marked "Hale" were dumped without securing a dump certificate. Complainant asked for $2.85 per bushel for the 78 bushels which were dumped and 50¢ per bushel on the other 342 bushels.

Respondent's manager stated, and his statements were corroborated by those of the selling agent, that 83 bushels of Hale peaches were included in the shipment at the direction of the agent because the agent considered them better than Elberta peaches, and that it was not known until the following day that they were affected with Brown Rot.

The amount of damages claimed did not exceed $500 and evidence was submitted in accordance with the shortened procedure in lieu of an oral hearing.

The record contained little information concerning the necessity for dumping the 78 bushels marked "Hale." The exact date of dumping was not disclosed, nor was it shown how the peaches were cared for from the date of arrival to the date of dumping. Letters written by the Duluth purchaser on the date of arrival, complaining as to condition, and on September 9, stating that the Hales were so poor that even with careful repacking none were sold, indicating that the peaches were not dumped until some date subsequent to September 9. There was no evidence of the market value of peaches if they had been of the grade warranted, except the sale price. There was no evidence of the market value of the peaches actually delivered. There was no record of resale made at Duluth so as to bring the proof of damages within the recognized methods of proof. As to the claimed loss of 50¢ per bushel on the Elbertas, complainant's

explanation was that the Duluth purchaser deducted that amount from the price, which, of course, was not proof of the market value of the inferior Elberta peaches, as alleged in the complaint.

Ruling included in Decision

Since there was no allegation in the complaint, and no evidence to the effect that at the time of purchase respondent was informed, or otherwise knew, that the peaches were being purchased for delivery by truck to a purchaser in Duluth, for resale there, recovery on the ground that the peaches were not in suitable shipping condition for such purpose, was not available to complainant. The complaint was dismissed.

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S-3095, March 2, 1944, Docket 4289: (S. P.)

KARDONSKY PRODUCE CO., FORT LAUDERDALE, FLA. v. WILLIE FRADEN PRODUCE CO., JACKSONVILLE, FLA.

Violation charged: Failure to pay the agreed purchase price for peaches and the buying brokerage for their purchase.

Principal point involved: Complainant not entitled to brokerage on second shipment since it failed to prove second shipment was ordered.

B-6
N-4

Order: Complaint dismissed.

Outline of Facts

Complainant claimed that on August 21, 1942 by oral contract with respondents he purchased for respondents' account a truckload of 405 bushels of peaches, the purchase price of which paid by him, including complainant's brokerage of 10¢ per bushel, was $867; that respondents accepted the peaches and paid $581.40, leaving an unpaid balance of $285.60; that on August 22, pursuant to a contract with respondents, complainant purchased for respondents' account a truckload of 408 bushels of peaches, for which respondents refused payment to the seller because the fruit was not acceptable, and that respondents failed to pay complainant his brokerage of $40.80, making the total sum of $326.40 due and owing from respondents.

Respondents denied entering into any contract with complainant for the purchase of the 408 bushels of peaches comprising the second load. They admitted the purchase of 365 bushels at $1.50 per bushel, plus 10¢ per bushel for brokerage, but alleged that complainant made an error in computation, charging double brokerage, and that the total amount owing for the peaches was $830.50 instead of $867; and that respondents paid complainant as follows: by check of September 5,

1943 $504.10, paid storage on the second shipment of peaches for complainant in the sum of $40.50 and cartage on the second shipment in the sum of $285.60. Respondents contended that complainant, by accepting the check which was accompanied by an invoice showing the credits, was estopped from denying the correctness of the invoice.

Rulings included in Decision

1. On August 22, 1942 complainant, without authorization from respondent, purchased the 408 bushels of peaches in question, and billed respondent for the purchase price of the peaches plus 10¢ per bushel brokerage, a total of $508.40. Complainant failed to sustain the burden of proving that respondents ordered this shipment and respondents were therefore not liable to the complainant for brokerage on this shipment.

2. Respondent paid in full for the lot of peaches purchased on August 21. They had a right to deduct the expenses incurred on the shipment which was not ordered and the check for $504.10 submitted in full payment represented the purchase price of the first shipment, $830.50, less credits for expenses which respondents incurred for complainant incident to the shipment which was not ordered.

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S-3098, March 17, 1944, Docket 4339 (S. P.)

IN RE: LUBER & FINKELSTEIN, PHILADELPHIA, PA.

Violation charged: Failure to keep proper records.
Principal point involved: Interests of proper enforcement of act did not require entering of formal order.
Order: Complaint dismissed.

Outline of Facts

Disciplinary complaint was filed under the Act on January 28, 1944, charging that respondent's accounts, records and memoranda did not fully and correctly disclose all transactions involved in its business. A prehearing conference was held on March 1, 1944. Respondent admitted the charge was true, waived a hearing, and authorized the War Food Administrator to make and enter findings of fact in conformity with the admission. However, complainant filed a request on March 6, 1944, asking that the complaint be dismissed since the keeping of defective records was believed to be due merely to inadvertence, and since at the prehearing conference respondent promised that it would thereafter adhere strictly to the requirements of the Act and Regulations. Complainant expressed the belief

that the interests of proper enforcement of the act do not require that there be entered against respondent a formal order imposing a penalty.

Ruling included in Decision

The complaint was dismissed.

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S-3100, March 20, 1944, Docket 4148:

Re: Rini Brothers, Cleveland, Ohio, Respondents

Disciplinary proceedings under the Act were instituted by complaint issued April 27, 1942, against Rini Brothers, Cleveland, Ohio. An examiner's report was issued on September 9, 1942, after which further action was postponed pending court action on the appeal of the decision in Pacific Coast Fruit Distributors, Inc. v. Rini Brothers, a reparation proceeding involving the same transaction. On March 10, 1944, in view of newly discovered evidence and respondents' request for dismissal, the Office of Distribution moved to withdraw the complaint and dismiss the proceeding.

Ruling included in Decision

The proceeding was dismissed, effective April 9, 1944, but the complaint is to remain as part of the record.

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S-3112, May 4, 1944, Docket 4285: (S. P.)

STUDER FRUIT CO., WATHENA, KANSAS v. KENNETH PRINGLE, WICHITA, KANSAS

Violation charged: Failure to pay an amount due on the purchase price of a truckload of tomatoes.
Principal points involved: Burden of proving sale to respondent was on complainant; when contract is uncertain resort is had to the circumstances.
N-4
F-17
Order: Complainant awarded $101.

Outline of Facts

On August 6, 1942, complainant conversed with respondent by telephone concerning the disposition of a truckload of 728 baskets of tomatoes which had been shipped from the vicinity of Independence, Mo. When the truck arrived shortly thereafter at respondent's place of business in Wichita, Kansas, he received the tomatoes and advanced to complainant's truck driver $100. He sold the tomatoes

and realized the sum of $201, offering to complainant $101, which was refused. Complainant claimed that respondent purchased the tomatoes at $1.05 per basket delivered; that the tomatoes were in good condition when shipped and respondent accepted them without objection; that several days later when complaint was made as to the condition it allowed a reduction of 5¢ per basket; and that there remained due and owing from respondent $628.

Respondent contended that the tomatoes had originally been shipped to another firm in Wichita and rejected because of defective quality; that complainant requested him over the telephone to sell the tomatoes then en route for $1 per basket; that he gave the truck driver $100 to get some salt at Hutchinson, Kans., as complainant requested him to do; and that he could sell only a few baskets, so, after repacking, he sold the remainder in the surrounding territory.

An oral hearing was waived. Respondent submitted two affidavits in support of his answer. Three exhibits attached to the complaint were the only written evidence of the contract. One appeared to be an invoice written by complainant and directed to respondent, stating the number of baskets, the total price, and a notation "Please send check with driver" and "also for last load Please." It was not shown that this invoice ever came to the attention of respondent. One was a carbon copy of a receipt, apparently given to the truck driver for complainant, which stated, "728 basket Tomatoes, Paid $100 cash. Dutch Pringle." The third was a wire dated August 29, 1942, sent to complainant by Dutch Pringle stating "Balance on tomatoes is $101. Will mail check."

Rulings included in Decision

1. Although respondent did not hold a license at the time of the transaction under consideration, as required by the provisions of the Act, he was subject to license.

2. Respondent agreed to sell the tomatoes for the account of the complainant. The burden of proving that the tomatoes were sold to respondent was upon complainant. The fact that respondent paid $100 to the driver at the time of delivery could not be decisive as it is a common practice for a selling agent to advance to the seller a part of the anticipated proceeds of sale. Where the contract is uncertain and disputed, resort must be had to the situation of the parties and circumstances under which the contract was made. Respondent stated that he had handled several other loads for complainant. Complainant admitted that respondent handled a truckload for complainant a short time prior to the one in question. These prior transactions had, at the least, the tendency to support the conclusion that the parties had agreed on this occasion for

respondent to handle the tomatoes on a consignment basis. As respondent did not see fit to claim his commission or expenses in selling, none was allowed. Complainant was awarded the balance of the proceeds realized from sale of the tomatoes, $101.

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S-3115, May 27, 1944, Docket 4303: (S. P.)

A. J. TEBBE & SONS CO., COTULLA, TEXAS v. GULF VEGETABLE & FRUIT CO. INC., WESLACO, TEXAS.

Violation charged: Failure to deliver a carload of tomatoes in compliance with contract specifications.
Principal points involved: Warranty of suitable shipping condition may arise by use of terms "f.o.b." or "suitable shipping condition"; seller does not assume responsibility for lack of suitable shipping condition beyond specified destination.
D-4
F-46
Order: Complaint dismissed.

Outline of Facts

On November 13, 1941, complainant purchased from respondent, at $1.50 per lug for U. S. No. 2 and 7x7 size and at $2.25 for the balance, or $1327.50 f.o.b., 625 lugs of tomatoes then being loaded at Weslaco, Texas. Complainant did not see and inspect the tomatoes, but relied upon respondent's representations that they would be officially inspected and the car would contain about equal amounts of size 6x6 and larger, standard pack, and 6 x 7 straight pack, not to exceed 15% to be U. S. No. 2, sizes 6x6 and 6x7, and approximately 15 lugs of U. S. No. 1; size 7x7, all except grade U. S. No. 2 to be 85% U. S. No. 1 or better. The car was consigned to complainant at St. Louis, Mo., and while in transit complainant made a joint account agreement with a New York City firm for resale at that point, and diverted the car from St. Louis. It arrived at New York on or about Nov. 23. On Nov. 26, complainant was notified that, due to poor quality, only 165 lugs were sold. Complainant released the New York firm from the joint account deal and had the remaining 460 lugs reloaded and shipped to Baltimore, Md., where they were sold on and between December 4 and 11 for gross proceeds of $429, or for $296.63 net. The 165 lugs were sold for $237.25, while expenses totaled $405.64 (freight, $357.52; cartage, $43.75; sorting, $4.37), making net proceeds for the car $128.24. Complainant claimed the tomatoes were not in suitable shipping condition or of the kind, grade and quality specified in the contract, and asked for damages in the amount of the difference between the contract price, $1327.50, and net proceeds of resale, $128.24, or $1199.26.

Complainant filed a waiver of formal hearing. Respondent waived hearing by failing to request one.

Federal inspection at Weslaco on Nov. 14 fixed the grade of the Gulf brand (535 lugs) as approximately 85% U. S. No. 1, and the Gold Rim brand (90 lugs) as U. S. No. 2 grade.

R.P.I.A. certificate of inspection Nov. 23, at Pier 22, New York City, certified averages of 3.5 soft ripe, 30.5 firm ripe, 29.5 turning, and the balance green except for decay. Averages of defects were: 14.5 light shoulder scars and skin checks; 20.5% growth cracks and shoulder scars; 2.5% puffy; and 10% affected by decay of various types and stages. R.P.I.A. certificate of inspection at Baltimore on Dec. 1, showed averages of 5% ripe and soft, 33% ripe and generally firm, 33% turning, and 8% mature green. An average of 21% were affected by decay, consisting of Phoma Rot and spotted soft decay.

Rulings included in Decision

1. The shipping point inspection certificate showed that the tomatoes at the time of sale and shipment met the kind, grade and quality specifications of the contract.

2. A previous decision pointed out that warranty of suitable shipping condition may arise as an express contractual provision when the buyer and seller employ the term "suitable shipping condition," or by the mere use of the term "f.o.b." in connection with the meaning given by the regulation, and may arise as an implied warranty when the seller has knowledge that the produce is purchased for the particular purpose of transportation to a given point by the purchaser, and the buyer relies upon the seller to exercise skill and judgment in selecting the produce which will serve the purpose without abnormal deterioration during transit from loading point to destination. This sale was f.o.b. Weslaco, Texas, and the designated destination was St. Louis, Mo. While complainant claimed that the shipment was consigned to that destination merely as a diversion point, the evidence did not show that respondent was informed that complainant intended to divert the car to New York City, and then to Baltimore, or to any other point beyond St. Louis. It is possible respondent knew that complainant was a dealer, and that as such dealer he might be expected to forward the shipment to one or more markets beyond St. Louis. However, there was no positive evidence of such knowledge. Moreover, even if such knowledge on the part of respondent was established, the regulation contemplates that the seller does not assume the responsibility for lack of suitable shipping condition in a commodity which moves to any destination other than the destination specified in the contract of sale. It is believed that such limitation under the regulation reflects its original purpose. The complaint was dismissed.

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S-3116, May 27, 1944, Docket No. 4296: (S. P.)

J. E. NELSON & SON, ALTOONA, PA. v. THE CHAS. ABBATE CO., CHICAGO, ILL.

N-4
F-13
F-43

Violation charged: Failure to deliver a carload of grapes in accordance with contract specifications.
Principal points involved: Burden of proof on complainant to establish alleged misrepresentation; in f.o.b. purchase buyer is liable under ordinary conditions for purchase price regardless of condition of goods at destination.
Order: Complaint dismissed.

## Outline of Facts

On November 30, 1942, complainant purchased from respondent a carload of 1099 lugs of grapes at $2 per lug, or a total of $2198, f.o.b. Exeter, Calif., the shipping point, on the terms Chicago acceptance, subject to Government inspection. Inspection was made at Chicago and relayed to complainant. Pursuant to complainant's request on Dec. 2, the car was held in Chicago until Dec. 3 and then diverted to Pittsburgh, Pa., where it arrived Dec. 7, at which time the grapes were in a deteriorated condition as shown by Government inspection certificate. On Dec. 10 and 11, complainant made resale at public auction in Pittsburgh at a loss of $1064.74, for which amount award was sought, on the ground that the grapes failed to meet contract terms and specifications and that respondent made false representations as to color and quality, date of arrival at Chicago and the number of lugs of each brand.

Respondent claimed complainant purchased a carload of 1099 lugs of Emperors. Respondent relied on an exhibit introduced by complainant as representing the terms of the contract, which set out the specifications as alleged by respondent, and denied misrepresentation.

Copies of the report of investigation were served on complainant and respondent on July 12, 1943. Oral hearing was waived by the parties and the evidence was submitted in writing.

## Rulings included in Decision

1. The inspection made at Chicago showed the grapes to be up to contract specifications. Complainant failed to sustain the burden of proving any misrepresentation on the part of respondent as to grade or date of arrival at Chicago. Its position that it would not have bought the grapes if it had known they arrived at Chicago November 27 could not be sustained since grapes are a highly perishable commodity and complainant requested that they be held in Chicago

until Dec. 3. There was evidence in the record that respondent did misrepresent the number of lugs of the various brands, in a telegram sent complainant on Dec. 1, but this misrepresentation was after the contract of purchase and sale was entered into by the parties. The contract did not call for certain brands, but for Emperors, a variety of grapes.

2. In an f.o.b. sale, on the basis of Government inspection, the purchaser is liable, under ordinary conditions, for the contract purchase price of produce regardless of its condition at destination. Since complainant could not hold respondent liable for its loss because the grapes arrived at destination in a deteriorated condition, the complaint was dismissed.

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S-3117, June 2, 1944, Docket 4272: (S. P.)

AMERICAN FRUIT GROWERS INCORPORATED, PITTSBURGH, PA. v. PAUL PAULOS & CO., CHICAGO, ILL.

Violation charged: Unjustified rejection of a carload of apples.

Principal points involved: Broker has authority to issue memorandum of sale making contract enforceable; in f.o.b. sale seller is responsible for shipping commodity in suitable shipping condition; increases in decay, stem punctures and bruising during transit were abnormal.

B-7
D-4
D-4a

Order: Complaint dismissed.

Reconsideration: Petition filed by complainant dismissed.

Outline of Facts

On Sept. 10, 1942, complainant sold to respondent 516 bushels of apples, described in the broker's memorandum of sale, issued by American National Cooperative Exchange, Inc., as 2¼ inch up Jonathans, Blue Goose brand, U. S. No. 1, at $1.40 per bushel f.o.b. Millsboro, Del., and the car was diverted at Harrisburg, Pa. on Sept. 11, to respondent at Chicago, Ill. The apples arrived at Chicago on September 15 and respondent had them inspected by a Federal inspector and by the Standard Inspection Service, Inc. and refused to accept them, claiming that they were not in accordance with complainant's sale specifications. Complainant resold them at Chicago for gross returns of $432.80, from which were deducted demurrage, unloading costs, freight, cartage and commissions totaling $263.45, resulting in net proceeds of $169.35, or a loss of $553.05, for which an award was sought.

Respondent contended there was no binding contract because the memorandum of sale was issued by complainant's agent and not by a public broker, but stated the shipment would have been accepted

had it conformed to representation made by complainant's agent.

The parties waived an oral hearing and submitted verified statements of facts. Although registry return receipt card was not returned on the copy of the complaint and of the report of investigation sent to respondent, respondent filed an answer to the complaint, which was accepted as proof of service.

Federal-State inspection was made at loading point, Millsboro, Del. and the apples were certified as U. S. No. 1, 2¼ inches and up, 25% to full red color, mostly 40% to 75% good red color. Grade defects consisted of stings, hail marks, insect injury, and cuts and bruises, but were within the tolerance permitted for the grade. The Federal inspector at Chicago five days later found grade defects ranging from 4 to 15%, averaging approximately 10%, consisting of excessive stings, misshapen and russeting apples. The condition of the apples was noted as hard. Most samples showed from 4 to 18%, a few none, average approximately 10% stem punctures, with an average of 7% bruises, and an average of 2% decay, ranging in most samples from 2 to 6%. The carload was graded U. S. No. 1, 2¼ inch minimum, the decay, stem punctures and bruises being factors of condition rather than grade when apples are graded following storage or transit.

Rulings included in Decision

1. There was a binding and enforceable contract of sale. The evidence showed that American National Cooperative Exchange, Inc. is a public broker notwithstanding the statement on its letterhead that it is terminal sales agent for complainant. A broker is an agent of his principal. The negotiation of all sales for complainant would not necessarily be contrary to its claimed status of a public broker. In a previous decision under the Act it was decided that this company is a licensed broker. With reference to respondent's contention that the broker's memorandum of sale is not a memorandum of the contract signed by the party to be charged, it was held that a broker who negotiates a sale of produce between seller and buyer has the authority, as broker, to issue a memorandum of sale so as to make the contract enforceable.

2. The apples were not in suitable shipping condition and respondent's rejection was not without reasonable cause. It was considered that the additional defects of 2% decay, 10% stem punctures, and 6% bruised apples were condition defects, as distinguished under the U. S. Standards for apples from permanent defects which affected their grade, and having occurred within the five day transit period, were abnormal. The complaint was dismissed.

Reconsideration

Petition for reconsideration was filed by the complainant,

who contended that the complaint had been erroneously dismissed. By supplemental order dated August 14, 1944, it was held that the petitioner had not brought up facts not previously considered, nor had he pointed out the application to the facts of any rule which has been recognized as an error in law, and therefore the petition was dismissed and the order made effective 20 days after date of the order. In the supplemental order it was stated that the apples were packed too tight in the baskets as indicated by the certificate of the inspector, and such tight pack contributed to the bruised condition found, and to the stem puncture noted, which, together with those affected by decay, constitutes proof of want of suitable shipping condition.

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S-3125, August 14, 1944, Docket 4348: (Hearing)

JOSEPH MARTINELLI & COMPANY, INC., SPRINGFIELD, MASS. v. LOWE BROTHERS, LOWES, KENTUCKY.

Violation charged: Failure to deliver five carloads of peaches.
Order: Case dismissed.

Outline of Facts

Complainant alleged that respondent failed to deliver five carloads of peaches purchased by complainant. A hearing was held on June 18, 1944. On June 20 a stipulation was filed in which both parties stated that the case had been settled and asked that the complaint be dismissed at the cost of the respondent.

Ruling included in Decision

The complaint was dismissed.

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S-3128, August 28, 1944, Docket 4310: (Hearing)

J. S. MCMANUS PRODUCE CO., WESLACO, TEXAS v. SWAN M. JORGENSEN, CAPITAL FRUIT & PRODUCE CO., BERNARD KANEVSKY, SPIZMAN FRUIT CO., JOHN L. KENNEDY, THE SECHTER CO. INC., AND NORTHWESTERN FRUIT CO., ALL OF ST. PAUL, MINN.

Violation charged: Unjustified rejection of a carload of grapefruit.
Principal point involved: Complainant failed to establish acceptance of its offer.
Order: Complaint dismissed.

Outline of Facts

On October 10, 1942, complainant shipped from San Juan, Texas, for distribution to pool buyers (the respondents) a carload of 427 Bruce boxes of grapefruit, consigned to the broker in the transaction, at St. Paul, Minn., where the car arrived Sunday, Oct. 18, and remained on track until October 25. Following the refusal of the respondents to accept, complainant made resale, on or about October 28, at $2.25 per box delivered Eau Claire, Wis., filing complaint for the amount of loss sustained, on the ground that the rejection was without reasonable cause.

It was conceded that the original understanding of the broker and respondents was for a shipment on Oct. 8 or 9, at $3.90 per box f.o.b., but that complainant's confirmation was not complete in that complainant did not agree to shipment on either of the days stated. Communications followed between the complainant and the broker, which resulted in complainant's offer to ship on Oct. 10 at $3.85 per box f.o.b. shipping point. The broker claimed that all respondents except Capital Fruit & Produce Co. consented to the Oct. 10 shipping date, and that the consent of representative of that company was given on October 12. Respondents testified to the contrary, claiming no contract was consummated. Copies of a standard memorandum of sale issued on October 14 by the broker, setting forth the number of boxes of different sizes, the names of the buyers, and the number of boxes ordered by each at a price of $3.85 f.o.b. Weslaco, were returned to the broker on October 15, the explanation of some of the buyers being that they had not agreed to shipment on October 10 and could buy grapefruit cheaper elsewhere.

Ruling included in Decision

Complainant failed to sustain the burden of establishing respondents' acceptance of complainant's offer. He argued that the broker's version of the acceptance agreement was corroborated by the exchange of wires between the broker and himself, whereas the testimony of respondents consisted of their recollection of what occurred. However, respondents' version of what took place was consistent with the return of their copies of the broker's memorandum of sale. It was difficult to resolve the conflicting evidence in complainant's favor. For example, it was alleged that the sale at $3.85 was concluded on October 10, but representative of the Capital Fruit & Produce Co. denied that he had any conversation with the broker regarding the grapefruit between October 7 and 14. The respondents who said they would accept their respective shares coupled their acceptance with the proviso that the other respondents would do likewise. Their acceptance was conditioned upon the happening of that contingency. It was concluded that some of the

respondents indicated a willingness to accept their shares of the carload at the reduced price for shipment on October 10, if the other pool buyers would also accept their portions, but the broker did not secure an acceptance from all the respondents. The complaint was therefore dismissed.

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S-3129, August 28, 1944, Docket 4311: (S. P.).

PAUL POULOS & CO., INC., CHICAGO, ILL. v. AMERICAN FRUIT GROWERS, INC., PITTSBURGH, PA., AND/OR MORRIS FRUIT CO., MINNEAPOLIS, MINN.

Violation charged: Failure truly and correctly to account by American Fruit Growers, Inc.; unjustified rejection by Morris Fruit Co.

Principal point involved: Suitable shipping condition liability ends at first destination.

D-4

Order: Complaint dismissed.

Outline of Facts

On Aug. 15, 1942, through a broker, American Fruit Growers, Inc., sold to complainant a carload of Blue Goose, U. S. No. 1 Elberta peaches, at $2 per bu. for 359 bus. of 2 inch and larger and $1.50 per bu. for 37 bus. of 1-3/4 inches and larger size, or a total of $773.50, f.o.b. Roanoke, Va. Shipment was made Aug. 17. Complainant claimed that when the car arrived at Chicago, Ill., on Aug. 20, the broker called and asked if resale profit on the load would be accepted; that complainant agreed to resale at 25¢ per bu. above the price paid and, at the request of the broker, the car was diverted to American Fruit Growers, Inc. at Minneapolis; that on August 24, complainant received a copy of the broker's memorandum of sale providing for shipment to American Fruit Growers, Inc., advise Morris Fruit Co., Minneapolis; and that the Morris Fruit Co. refused to accept the peaches and the resale price of $852.70 was not paid. Resale after rejection resulted in net proceeds of $423.46, which amount complainant accepted, reducing the amount of damages claimed to $429.24.

The sales manager of American Fruit Growers, Inc., at Hagerstown, Md. claimed that complainant had the peaches inspected on arrival at Chicago by the Standard Inspection Service, was satisfied that they complied with the contract of sale, accepted and paid for them, and resold them to Morris Fruit Co. through W. A. White Brokerage Co., and diverted the shipment to Minneapolis.

The broker claimed that on Aug. 20 W. A. White Brokerage Co. asked about peaches for its principal, Morris Fruit Co., and purchased the peaches from complainant for its principal; that, acting

on complainant's instructions, the carload was forwarded to Minneapolis; that American Fruit Growers, Inc. had nothing to do with resale and reshipment, but provided for reshipment from Chicago to American Fruit Growers, Inc. at Minneapolis under the impression that the bill of lading covering shipment from Roanoke to Chicago named American Fruit Growers, Inc. as consignee and that reshipment to Minneapolis should be made by the consignee named in the bill of lading.

Morris Fruit Co. claimed to have explained to W. A. White Brokerage Co. that the peaches would not be accepted unless they were U. S. No. 1, and to have been informed that they compared favorably with Carolina and Georgia peaches and would arrive at Minneapolis in good condition; and that they were not of the kind, condition and quality purchased.

At the time of shipment from Roanoke, the peaches graded U. S. No. 1, and the stock was mature, firm to firm ripe, mostly firm, clean and well formed, grade defects within tolerance and less than 1% decay.

When the car arrived at Chicago on August 20, the temperature in the car was 48° at the top and 44° at the bottom. The peaches were then firm to full, mostly firm ripe; from 4 to 12% were slightly soft; decay ranged from less than 1% to 5%, averaging approximately 3%, brown rot in various stages.

Federal inspection at Minneapolis on Aug. 22, the date of arrival, showed, of the Virginia Beauty brand, size 1-3/4 inch minimum, that the peaches were generally firm, 3% soft bruised and from 16 to 22%, average approximately 20%, affected by decay, and size 2 inches and up contained soft bruised stock ranging from 3 to 25%, averaging 10%, and decay affected up to 20%, averaging approximately 10% for the lot. Of the lots stamped Virginia Orchards, size 1 3/4 inch minimum averaged 3% soft bruised and were affected by decay ranging from 1 to 15%, averaging approximately 9%, and size 2 inches and up averaged 5% soft bruises and 7% decay. The decay was Brown Rot and Rhizopus Rot, mostly Brown Rot, in various stages, mostly advanced.

Rulings included in Decision

1. The evidence did not support complainant's claim that resale was made to the American Fruit Growers, Inc. Such resale, if made, was negotiated by the broker. The memorandum of sale prepared by the broker recited resale to W. A. White Brokerage Co. for Morris Fruit Co., shipment being made to the American Fruit Growers, Inc., advise Morris Fruit Co., and that such resale was made for the account of the complainant. He explained why reshipment was made in the name of American Fruit Growers, Inc.

If complainant was not furnished with a copy of the memorandum of sale promptly, such failure to receive it was the fault of his own agent, for which respondents were not responsible. To accomplish reshipment to Morris Fruit Co. the broker, on instructions of complainant, diverted the car to American Fruit Growers, Inc., advise Morris Fruit Co.

2. American Fruit Growers, Inc. delivered peaches to the carrier that were then in suitable shipping condition for shipment to Chicago, Ill. That the movement to Chicago was normal was not questioned. The U. S. Standards for U. S. No. 1 peaches provide for not more than 1% decay at shipping point, and not more than an additional 2% soft, overripe or decay occurring in transit or at destination shall be allowed. The average of 3% affected by decay on arrival at Chicago was not evidence of a want of suitable shipping condition.

3. The liability of American Fruit Growers, Inc. could not be extended to the loss sustained by complainant which resulted from refusal of Morris Fruit Co. to accept the shipment at Minneapolis. That loss was calculated as the difference between the purchase price and net proceeds of auction sales made at Minneapolis and reflected deterioration in the peaches after arrival at Chicago. The suitable shipping condition liability of American Fruit Growers, Inc. terminated on arrival at Chicago.

4. Morris Fruit Company's rejection was not unlawful since the decay increased during transit to Minneapolis to an average ranging from 7 to 20% in the various lots. The complaint was dismissed.

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